

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WISCONSIN

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UNITED STATES OF AMERICA,

FINAL HEARING ORDER

Plaintiff,

11-cr-21-bbc

v.

SANG DANH,

Defendant.

- - - - -

A final hearing was held in this case on January 12, 2012, before United States District Judge Barbara B. Crabb. The government appeared by Tim O'Shea. Defendants appeared in person and by counsel, David Mandell.

Counsel predicted that the case would take 3-4 days to try. They understand that trial days will begin at 9:00 and will run until 5:30, with at least an hour for lunch, a short break in the morning and another in the afternoon.

Counsel had no changes to the voir dire questions as amended by the magistrate judge. The jury will consist of 12 jurors plus two alternates to be selected from a qualified

panel of 31. The government will exercise six peremptory challenges against the panel plus one against the alternates. Defendant will exercise 10 peremptory challenges against the panel plus one against the alternate pool.

Before counsel give their opening statements, the court will give the jury introductory instructions on the way in which the trial will proceed and their responsibilities as jurors.

Counsel agreed that all witnesses would be sequestered. Counsel are either familiar with the court's visual presentation system or will make arrangements with the clerk for instruction on the system.

Counsel should use the microphones at all times and address the bench with all objections. If counsel need to consult with one another, they should ask for permission to do so. Only the lawyer questioning a particular witness may raise objections to questions put to the witness by the opposing party and argue the objection at any bench conference.

Counsel discussed the instructions on liability briefly. Final decisions on the instructions and form of verdict will be made at the instruction conference once the parties have put in their evidence.

The following rulings were made on the parties' motions in limine.

#### Government's Motions

1. Motion in limine no. 1- reasonable doubt, Dkt. #119

The government's motion to bar defendant from defining reasonable doubt is GRANTED. However, defendant may argue in closing that various pieces of evidence create reasonable doubt.

2. Motion in limine no. 2 - penalties, Dkt. #121

The government's motion to bar defendant's counsel from eliciting testimony from witnesses or arguing to the jury about the potential penalties defendant may face if convicted is GRANTED. However, defendant's counsel may question defendant about what he told his wife on the telephone, including the fact that she would be away from their child if she were to go to prison.

3. Motion in limine no. 3 -reasons for prosecuting defendant, Dkt. #122

The government's motion to bar defendant from putting in evidence that it targeted defendant because of his race or ethnicity or for any other improper motive is GRANTED, although defendant's counsel may ask questions about whether the government identified defendant as the perpetrator of the fraud and prosecuted him because of his prior criminal conviction.

4. Motion in limine no. 4 - flash drive, dkt. #125

The government's motion to bar defendant from putting in evidence of an email purported to have been written by Khoi Le is GRANTED. The statement is hearsay.

### Defendant's Motions

1. Defendant's motion in limine to bar introduction of certain photographs, Dkt. #116

This motion is GRANTED without objection as to a photograph of a man holding \$100 bills and as to a photograph of defendant without a shirt. Defendant has withdrawn his motion in ¶ 1 of this motion to bar introduction of multiple photographs depicting defendant and others flashing apparent gang signs.

2. Defendant's motion in limine to bar introduction of prior statements given to a police officer in California, Dkt. #117

This motion is DENIED. The government may ask defendant about these prior statements if he takes the stand.

3. Defendant's motion in limine to admit additional statements of co-defendants, Dkt. #120

This motion is GRANTED without objection.

4. Defendant's motion in limine to introduce other acts evidence, dkt. #123

Defendant wants to put in evidence that Khoi Le engaged in a scheme in California similar to the one in Wisconsin for which defendant is charged, that is, it involved stolen credit card information, purchase of merchandise using the stolen information and delivery of the merchandise to Khoi's house. He thinks that this evidence will tend to show that he

was not he but Khoi who carried out the Wisconsin scheme.

In the cases that defendant has cited, the other acts evidence cited by defendant has involved questions of identity. In United States v. Stevens, 935 F.2d 1380 (3d Cir. 1991), for example, the court of appeals remanded a criminal prosecution for a new trial because the district court had not allowed the defendant to put in evidence of a robbery close in time similar to the one charged against him in which another person was held responsible. In United States v. Seals, 419 F.3d 600 (7th Cir. 2005), the court of appeals upheld a district court's decision not to allow the defendant to introduce evidence of another robbery, arguably similar in nature as well as close in time and distance. Judge Posner concurred in the outcome because the strength of the government's case against Seals was overwhelming, but he argued that the evidence should have been admitted because of the similarities of the two robberies and the concession that different people had committed the other one. "Evidence is relevant, and therefore not barred by Rule 402, if it increases the strength of the case of the party who wishes to present the evidence at trial." Seals, 419 F.3d at 611 (citing Fed. R. Evid. 401; Old Chief v. United States, 519 U.S. 172 (1997); United States v. Hodges, 315 F.3d 794, 800 (7th Cir. 2003); United States v. Stevens, 935 F.2d at 1401–06).

This is not a case in which showing that Person B committed a similar crime will tend to show that Person A did not. Even if the evidence defendant wants to use may tend to

show that Khoi engineered the scheme charged against defendant, it will not show that defendant had no involvement in it. Evidence of the prior scheme does not negate the possibility that both he and Khoi took part in the present one. On the other hand, defendant maintains that the additional evidence will not take up any significant amount of time or that it will be confusing to the jury. There is a slight probability it will strengthen defendant's case. This is enough to make it relevant.

I will allow defendant to introduce limited evidence of Khoi's participation in a prior credit card scheme in California during his case in chief.

Entered this 13th day of January, 2012.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge